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Supreme Court of the United States

OCTOBER TERM, 1977

No. ~~77-~~1010

MIAMI HERALD PUBLISHING COMPANY, GENE MILLER, TIMES PUBLISHING COMPANY and ANGEL CASTILLO

Petitioners,

v.

THE HONORABLE BEN KRENTZMAN
United States District Court for
the Middle District of Florida

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Parker D. Thomson
Sanford L. Bohrer
PAUL & THOMSON
1300 Southeast First
National Bank Building
Miami, Florida 33131

William C. Ballard
BAYNARD, LANG
AND BALLARD
669 First Avenue North
St. Petersburg, Florida 33701

James D. Spaniolo
One Herald Plaza
Miami, Florida 33101

Counsel for Petitioners

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	4
INTRODUCTION	4
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	16
I. The Decision Below Raises A Significant, Recurring and Unresolved Problem Concerning the Power of Trial Judges to Close Portions of Public Trials to the Public and Press and the Circumstances Under Which Such Powers May Be Exercised	16
II. The Decision Below Raises the Significant, Recurrent, Recurring and Unresolved Problem of Whether Entry of a Closure Order May Be Considered Without Prior Compliance With Procedures Meeting Due Process Requirements	27
CONCLUSION	29

CITATIONS

CASES **Page**

Carroll v. President and Commissioners of Princess Anne,
393 U.S. 175 (1968) 27

CBS, Inc. v. Young,
522 F.2d 234 (6th Cir. 1975) 6, 19

Central South Carolina Chapter, Society of Professional Journalists, et al. v. Martin,
556 F.2d 706 (4th Cir. 1975), *cert. denied,*
No. 77-263 (January 9, 1978) 6, 19

Chicago Council of Lawyers v. Bauer,
522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom Cunningham v. Chicago Council of Lawyers,* 427 U.S. 912 (1976) 6, 19

Cox Broadcasting Corporation v. Cohn,
420 U.S. 469 (1975) 13

Craig v. Harney,
331 U.S. 367 (1947) 23

English v. McCrary,
348 So.2d 293 (Fla. 1977) 20

Gannett Co., Inc. v. DePasquale,
___ N.Y. ___ N.E.2d___, No. 549
(December 19, 1977) 22

CITATIONS (Continued)

Page

In Re Oliver,
333 U.S. 257, 268 (1948) 23

In Re The Washington Post Company, et al.,
No. 76-1695 (4th Cir., filed July 19, 1976) 6, 18, 19

Keene Publishing Corp. v. Keene District Court,
___ N.H. ___, ___ A.2d ___
No. 7953 (November 23, 1977) 21

Lewis v. Peyton,
352 F.2d 791 (4th Cir. 1965) 24

Miami Herald Publishing Company v. Collazo,
329 So.2d 333 (Fla.3d Dist.Ct.App. 1976) *cert. denied,* 342 So.2d 1100 20

Miami Herald Publishing Co. v. Tornillo,
418 U.S. 241 (1974) 18

National Socialist Party of America v. Skokie,
___ U.S. ___, 97 S.Ct.___, 53 L.Ed.2d 96
(1977) 28

Nebraska Press Association v. Stuart,
427 U.S. 539 (1976) 5, 6, 7, 16, 19, 20, 28

Page

News-Press Publishing Co., Inc. v. State,
345 So.2d 865 (Fla.2d Dist.Ct.App. 1977); *cert. denied* ___ So.2d ___ Case No. 51,639 (November 11, 1977) 20

Northwest Publications, Inc. v. Anderson,
___ Minn. ___ 259 N.W.2d 254 (1977) 21, 27

Pell v. Procunier,
417 U.S. 817 (1974) 13

Philadelphia Newspapers, Inc., et al., etc. v. Jerome,
No. 77-308 (Pa. 1977), appeal docketed No. 384 (1977) 7, 21

Schiavo v. United States,
504 F.2d (3rd Cir. 1974) *cert. denied sub nom Ditter v. Philadelphia Newspapers, Inc.* 419 U.S. 1096 (1975) 28

Sheppard v. Maxwell,
384 U.S. 333 (1966) 5, 14, 18

State ex rel Dayton Newspapers, Inc. v. Phillips,
351 NE2d 129 (1976) 21

Page

State ex rel Gore Newspapers Co. v. Tyson,
313 So.2d 777 (Fla. 4th Dist. Ct. App. 1976) *overruled on oth. gnds. English v. McCrary,*
348 So.2d 293 (Fla. 1977) 20

State ex rel. Miami Herald Publishing Company v. McIntosh,
340 So.2d 904 (Fla. 1977) 20

State v. Allen.
___ N.J. ___, 373 A.2d 377 (1977) 17, 21

Thomson v. Cash,
117 N.H. ___, 377 A.2d 135, (1977) 21

United Press Association v. Valente,
308 N.Y. 71, 123 N.E.2d 777 (1954) 23

United States ex rel. Bennett v. Rundle,
419 F.2d 599 (3rd Cir. 1969) 24

United States v. Columbia Broadcasting System, Inc.,
497 F.2d 102 (5th Cir. 1974) 15

United States v. Dickinson,
465 F.2d 496 (5th Cir. 1972) 23

Page

United States v. Mitchell,
551 F.2d 1252 (D.C. Cir. 1976), *cert. granted sub nom Nixon v. Warner Communications, Inc.*, 45 U.S.L.W. 3651 (March 28, 1977) ... 17, 25

United States v. Tijerina,
412 F.2d 661 (10th Cir. 1969), *cert. denied*, 396 U.S. 990 (1969) 6, 19

CONSTITUTIONAL PROVISIONS, STATUTES, RULES:

Federal Appellate Rules 10 (c), 11 (a), 11 (b) 25

Fifth Amendment to the United States Constitution 4

First Amendment to the United States Constitution 4, 11

General Rule 16c of the Middle District of Florida 26

Local Rule 12, General Rules of the Middle District of Florida 25

Manual for the Clerks of the United States District Courts 25

Moore's Federal Practice, V.19, Paragraph 21.04[2] 25

Page

Ninth Amendment to the United States Constitution 4, 23

Sixth Amendment to the United States Constitution 15

MISCELLANEOUS:

American Bar Association Legal Advisory Committee on Fair Trial and Free Press, Draft Report, (August, 1977) Standard 3.5 ..... 17, 27

American Bar Association, Recommended Court Procedures to Accommodate Rights of Fair Trial and Free Press (August 1976) 27

"Free Press — Fair Trial", A Staff Report of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 2d Sess. (1976) 17

Heller, *The Sixth Amendment to the Constitution of the United States* (1917) p. 155 23

Lord Coke, Second Institutes 23

Radin, *The Right to a Public Trial*, 6 Temple L. Quarterly, 381-383 (1932) 23

Wigmore, *Evidence* (3rd Ed. 1940) §2250 23

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OPINION BELOW

The opinion of the Court of Appeals, reported at 558 F.2d 1202, appears in the Appendix to this Petition. No formal opinion was rendered by the District Court, but excerpts of a transcript of the hearing in which the District Court explained its actions, a written order based on that explanation and affidavits describing further actions based on the District Court's explanation are also included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered September 12, 1977. A timely petition for rehearing *en banc* was denied without opinion on October 18, 1977, and this petition for certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1.

Whether a Federal Trial Judge violates Constitutional safeguards when he uses "trial management" techniques to close trial proceedings solely to limit press coverage of a trial when there exists merely a "bare possibility" of preiudice to a fair trial.

2.

Whether, a Federal Trial Judge can utilize "trial management" techniques to limit the

news concerning a trial without violating common law rights to open judicial proceedings and records when there is no showing open proceedings and records will prejudice a fair trial.

3.

Whether, in the exercise of its supervisory power, this Court should require a Federal Trial Judge to afford notice and hearing to affected parties prior to entry of an order closing a judicial proceeding, reduce such order to writing and exhibit compliance with Constitutional requirements.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First, Fifth, and Ninth Amendments to the United States Constitution. The relevant portions of those Amendments are:

First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

INTRODUCTION

This petition arises from a collection of orders entered and actions taken by a federal trial judge restricting public and press access to documents, testimony and legal argument during the lengthy trial of former United States Senator Edward J. Gurney.[1] These restrictive orders were not docketed and when entered were not publicly disclosed. Petitioners discovered their existence only from experiencing their impact.

[1]Senator Gurney was tried twice and ultimately acquitted. This petition involves the first of these trials (*U.S. v. Gurney*, U.S.D.C., M.D.Fla., Case No. 74-122-Cr), which began on February 24, 1975 and ended on August 6, 1975. Respondent was the presiding judge at this trial.

In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), this Court set forth constitutional standards applicable to trial judges' use of direct prior restraints on publication to prevent pretrial publicity relating to criminal cases. Although this Court did not there rule that such prior restraints could never be entered, the standards set forth may well point to that conclusion.[2] Nevertheless, this Court's decision in *Nebraska Press Association* and its reliance on *Sheppard v. Maxwell*, 384 U.S. 333 (1966) suggested several possible alternatives in the nature of "trial management" might exist. Since *Nebraska Press Association*, trial courts seeking to control trial publicity increasingly have employed the suggested trial management techniques and, in this and some other cases, have used techniques not suggested.

Trial management techniques utilized have fallen into two categories: "no comment" orders to trial participants, and "closure" orders closing trial proceedings and documents to press and public. "No comment" orders, specifically mentioned in *Nebraska Press Association. supra*, and *Sheppard v. Maxwell, supra*[3], do not directly affect the proceedings themselves; instead they directly restrain the extrajudicial conduct of persons over whom the Court already has jurisdiction, and only collaterally affect persons (such as press and public) outside the judicial system. In contrast, "closure" orders do not directly restrain persons within the judicial system; instead they close normally public proceedings

[2]*See Id.*, at 570, 570-71 (White, J., concurring); *Id.*, at 572, 572-73 (Brennan, J., concurring); *Id.*, at 617 (Stevens, J., concurring).

[3]427 U.S. at 553-554, 384 U.S. at 362-363.

and seal normally public records, and their direct impact is on persons outside the judicial system, specifically, press and public.

A majority of the Circuit Courts have rendered decisions discussing the standards for use of trial management techniques. One Circuit has dealt with both types, holding a closure order sealing judicial documents a prior restraint[4] and presumably subject to *Nebraska Press Association* tests, but holding a no comment order sustainable if a "reasonable likelihood" of threat to a fair trial be shown.[5] Four other Circuits have dealt with no comment orders, two (the Sixth and Seventh Circuits) permitting their entry only when they are necessary to alleviate a "serious and imminent threat" to a fair trial[6] and two (the Ninth and Tenth)[7] apparently joining the Fourth in the "reasonable likelihood" test. Other than the Fourth Circuit, only the Fifth Circuit in this case has addressed a closure order, and it endorsed entry of such orders if the trial judge finds a "bare possibility" of danger to the administration of justice.

In short, six of the eleven Circuit Courts have rendered decisions on the use of trial management devices and applied at least three different standards. Furthermore, the highest courts of several states have rendered decisions in this area and are in comparable disagreement.[8] This case affords this Court the opportunity to articulate the proper constitutional standards for closure of judicial proceedings and thus provide much-needed guidance on important questions of constitutional law not only unresolved but increasingly recurring after *Nebraska Press Association, supra.*

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[4]*In Re The Washington Post Company, et al.*, No. 76-1695 (4th Cir., July 19, 1976) (App. 67).

[5]*See Central South Carolina Chapter, Society of Professional Journalists, et al. v. Martin*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, No. 77-263 (January 9, 1978). Judge Widener was on the panel in both Fourth Circuit decisions.

[6]*CBS, Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976).

[7]*United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969), *cert. denied*, 396 U.S. 990 (1969). The Solicitor General has stated the "reasonable likelihood" test was also adopted by the Ninth Circuit in *Farr v. Pitchess*, 522 F.2d 464, 468 (1975), *cert. denied*, 427 U.S. 912 (1976). See Brief for Respondent in Opposition, *Central South Carolina Chapters, Society of Professional Journalists, et al. v. Martin, supra* note 5.

[8]One of these decisions is the subject of an appeal to this Court. *Philadelphia Newspapers, Inc., etc., et al. v. Jerome*, No. 77-308. The Pennsylvania Supreme Court's decision was vacated and the case remanded for further proceedings to clarify the record on January 9, 1978.

STATEMENT OF THE CASE

I. The District Court

1. *The Public Interest in the Trial.*

The charges against Senator Gurney, criminal misuse of office, had been the subject of extensive news coverage by Petitioner newspapers and all other Florida newspapers, radio and television stations for the two years prior to the trial. Petitioner reporters were assigned to daily coverage of the trial and representatives of many print and broadcast media also attended the trial.

The press and broadcast trial coverage was balanced and subdued. No intimation of "sensational" coverage was made. The judge complimented the press on its reporting (App. 34, 36).

2. *Conduct of the trial.*

The trial judge daily gave standard cautionary instructions.[9] Incontestably these instructions were proper; equally incontestably these instructions were followed (App. 33, 36). The jury was not sequestered until it commenced deliberations.

[9]He daily instructed all jurors "not to discuss the case, not to read any newspapers other than those cleared by counsel and given to the jurors by the Clerk, and not to listen to or view broadcasts concerning the trial". 558 F.2d at 1205.

3. *The Restrictive Orders.*

With the admitted purpose of preventing publication of matters not submitted to the jury,[10] the trial judge entered orders and took actions so as to close to press and public portions of the trial proceedings not submitted to the jury. These actions included (i) bench conferences while the jury was absent from the courtroom, (ii) sealing of transcripts of bench conferences, (iii) sealed communications between judge and jury after its sequestration, (iv) instructions to the court clerk to refuse inspection of exhibits in evidence exhibits presented in open court but not yet admitted into evidence, exhibits offered but rejected, and court exhibits, (v) limitations on public or press inspection of all exhibits, and (vi) instructions to trial participants not to speak to the press.[11]

(i) *Bench conferences*

A complete transcript of the trial was never prepared, but a partial transcript of the trial showed some 400 bench conferences which, if transcribed, would apparently cover 4,000 pages. Many of the bench conferences were held with the jury excused.[12]

[10]That the press was the target of these various actions was acknowledged by the Fifth Circuit. 558 F.2d at 1206.

[11]The trial judge's no comment orders were not the subject of the appeal to the Fifth Circuit and their validity is not challenged by this Petition.

[12]This information was determined by a review of the record made by Counsel for Petitioners in December, 1977. This record was mainly prepared in connection with the second trial of Senator Gurney after this appeal was taken to the Fifth Circuit.

These bench conferences involved proffers of testimony or exhibits, objections, legal argument, and rulings. One bench conference involved a 26 minute testimonial proffer, after the jury was excused from the courtroom, by one of Senator Gurney's codefendants as to whether the government promised not to indict him if he changed his testimony as to a key conversation involving Gurney. (App. 45-46)

Despite the jury's absence and the obvious public interest in the issue raised by the question, the judge carefully staged the proffer at the bench so as to be inaudible to press and public.

(ii) *Sealing of transcripts*

Whenever Petitioners sought transcripts of bench conferences, the judge ordered the transcripts sealed. Thus:

> Those matters were proffered outside of the presence of the jury and I have directed the court reporter to seal them. You will not be able to get that. (App. 47).

(iii) *Judge-jury communications after sequestration.*

After the jury was sequestered for its deliberations, the jury delivered to the judge a written communication relating to one of the judge's jury's instructions. The judge summoned the attorneys to a 38 minute bench conference which, although the jury was sequestered, was conducted so as to be inaudible to press and public. After a lengthy recess to prepare a written response, the

judge held another bench conference with the attorneys. The jury request was then made a court exhibit, which the press then sought to inspect. The judge refused and ordered the exhibit sealed. (App. 47-48). The next day, the judge replied in writing to the jury. Again the press sought to inspect the reply and again the judge refused and sealed the exhibit. (App. 52-53).

(iv) *Denial of permission to inspect exhibits.*

As the Fifth Circuit summarized, "After the trial got under way . . . the appellant newsmen sought to inspect various documents and exhibits, some of which were in evidence and some of which were only identified. The Clerk refused access to many of these items pursuant to oral directions of the district judge." 558 F.2d at 1205. As the judge stated:

> ". . . And, Mr. Castillo, you are not going to be allowed to look at all the exhibits received in evidence but not read to the jury. And if that be trespass on the First Amendment, so be it . . . that is what I am going to do." (App.40).

(v) *Limitations on access to all exhibits.*

The trial judge did not restrict inspection to a "pool" reporter or specify times for inspection. Instead he simply limited access to the clerk's administrative convenience and declined to establish any standards for exercise thereof. 558. F.2d at 1209, n. 11

4. *Non-disclosure of Existence or Scope of Closure Orders*

The judge did not make public his closure orders nor did he give press or public prior or subsequent notice of his intent to issue them or their issuance; obviously, no opportunity to be heard thereon was afforded. For example:

> If, to present a fair trial in this Courtroom, I have to stop and enter a written Order every time I do it — if somebody tells me I have to do it, I will do it, but not until. And I am not going to have a hearing and give a due process hearing to the press before I do it." (App. 34).

The press and public were thus unaware of the orders until their impact was perceived. Much information about the nature and extent of the closure orders and the trial judge's admission as to their purpose were not divulged until Petitioners moved to vacate those orders of which they had become aware, and a hearing was held on this motion.

5. *The orders were routinely entered without regard to the rights of press and public.*

In entering the closure orders, the trial judge was concerned only with ensuring a fair trial, although he was aware of the threat such orders present to the public auditing of the administration of justice. (See, e.g. App. 57, 63).

The trial judge's stated reason for his restrictive orders was the "bare possibility" the jury would violate his

cautionary instructions and read the newspapers, even though he stated he had no reason to believe any juror would do so and he simultaneously complimented the press on its reporting of the trial.[13]

II. The Fifth Circuit

The Fifth Circuit affirmed the District Court's orders. While noting "the questions presented here could affect many other cases" but were "largely unsettled", 558 F.2d 1207, that court's rationale for its decision is not clear.

The court characterized the case as one of "access" or "news gathering" but did not make that issue dispositive. Thus, while concluding that under *Pell v. Procunier*, 417 U.S. 817 (1974), press access should not exceed that of the public,[14] the court stated that "what right of access the public has . . . , [which] has yet to be

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[13]THE COURT: . . . I hope that the jury is not reading what is in the newspapers. I don't think they are. But there is always that bare possibility.

* * *

I mean the press is doing actually a remarkable job.

I have come to a renewed appreciation for investigative journalism." (App. 36).

[14]Contrary to these implications in the Fifth Circuit's opinion, Petitioners have not asserted here a greater right of press than public to witness a trial. Although this Court has observed the special posture of the press in trial coverage for the public benefit (*Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975)), and although adequate management may require use of a "pool reporter" for access to trial events rather than the general public, the interests of press and public in the subject matter here are identical.

defined by the Supreme Court, is not required [to be determined] by the limited questions presented for review here." 558 F.2d at 1209, n.10 The court also apparently in part based its decision on its erroneous belief that alternative sources existed for the information sought, 558 F.2d 1208.[15]

The key to the Fifth Circuit's decision is its conclusion that closure of portions of the trial did not involve First Amendment protections. This being so, there were no limitations on the trial judge's selection of "trial management" techniques:

> "The First Amendment does not protect against whatever incidental burdens on newsgathering occurred in this case. The trial judge employed reasonable 'remedial measures', far short of prior restraints, to prevent *possible* prejudice and maintain an orderly trial. See *Sheppard, supra,* 384 U.S. at 362, . . . The district court's rulings denying press access implemented a legitimate governmental interest in securing for the accused the fair trial guaranteed them by the Sixth Amendment. The court's actions bore a *reasonable relation* to the achievement of that purpose." 558 F.2d at 1211 (emphasis supplied)

The Fifth Circuit, concerned with the " 'heavy obligation [which] rests on trial judges to effectuate the fair-

[15]The Fifth Circuit suggested that "the parties, the witnesses, the attorneys, and members of the public generally" were sources of information. 558 F.2d at 1208, n. 8. In fact the defendants and their attorneys had been subjected to a no comment order. (App. 57, 59).

trial guarantee of the Sixth Amendment.' *United States v. Columbia Broadcasting System, Inc.,* 497 F.2d 102, 104 (5th Cir. 1974)," afforded the trial judge broad discretion and concluded that within his inherent power over trial management the trial judge may not only seal the lips of trial participants but may also close portions of the trial itself if that closure order bears a "reasonable relation" to protecting Sixth Amendment interests. By its reference to "possible prejudice", the Fifth Circuit apparently approved the trial judge's "bare possibility" justification for his orders.

The Fifth Circuit thus believes closure orders need not be based either on (i) any shown degree of prejudicial publicity or (ii) any shown degree of necessity for the degree of restriction employed.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES A SIGNIFICANT, RECURRING AND UNRESOLVED PROBLEM CONCERNING THE POWER OF TRIAL JUDGES TO CLOSE PORTIONS OF PUBLIC TRIALS TO THE PUBLIC AND PRESS AND THE CIRCUMSTANCES UNDER WHICH SUCH POWER MAY BE EXERCISED.

(a) *The decision below raises the significant question of what circumstances justify the entry of orders closing portions of trial proceedings and records to press and public.*

This case goes to the heart of current issues of fair trial-free press.[16] The Fifth Circuit here has accorded federal trial judges under its supervision virtually unlimited discretion to selectively close portions of public trials whenever they perceive the "bare possibility" of prejudice to the administration of justice. Since *Nebraska Press Association,* and possibly in part because of that decision a number of other courts, a Congressional Committee, and an ABA Committee appointed to study the problems raised by closure orders have considered what standards should be applied to

[16]Justices of this Court have recognized the issue of closure orders as one of constitutional dimension, yet unresolved. *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 564, n. 8; 427 U.S. at 576, n. 3 (Brennan, J., concurring, joined by Stewart and Marshall, J. J.)

"trial management" techniques, with varying results. All authorities, however, including the Fifth Circuit, acknowledge the "importance of the rights involved" the "continuing nature" of the problem, and that "many other cases" will be affected by the resolution of the issues. 558 F.2d at 1207.

With the exception of the Fifth Circuit, no authority has approved standards permitting closure of judicial proceedings or records *after commencement of the trial* without a showing meeting stringent "clear and present danger", "serious and imminent threat" or similar tests. See e.g., *State v. Allen,* 373 A.2d 377 (N.J. 1977) (applying such standards to bench conferences and other in camera proceedings); *In Re Washington Post Company, et al., supra* note 4; *United States v. Mitchell,* 551 F.2d 1252 (D.C. Cir. 1976), *cert. granted sub nom Nixon v. Warner Communications, Inc.,* 45 U.S.L.W. 3651 (1977); "Free Press-Fair Trial," A Staff Report of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 2d Sess. (1976), draft report, ABA Legal Advisory Committee on Fair Trial and Free Press (August 1977). As was stated in commentary to Standard 3.5 of the ABA Legal Advisory Committee's draft report, "The presumption is strongly in favor of open judicial proceedings and unsealed records."

If permitted to stand the Fifth Circuit's decision will prevent the press from being the "handmaiden of ef-

fective judicial administration,"[17] closely auditing judicial power and critically evaluating the judicial process; instead the press will be relegated to what this Court has held it is not — a "passive receptacle or conduit for news . . ."[18] the judiciary is willing to make public.

(b) *The "standard" for closure endorsed by the Fifth Circuit conflicts with decisions of other courts of appeal and state courts as to the requirements for entry of closure orders.*

1. *Courts of Appeals.*

The Courts of Appeals which have considered the propriety of the use of trial management devices have applied at least three, possibly four, different tests:

(i) *Fourth Circuit on "closure" orders: a "prior restraint" test.*

In *In re Washington Post Company, supra,* the Fourth Circuit equated a trial court's sealing of court files with a "prior restraint". (App. 68) Although the court made no reference to any test, presumably it would apply the standards of *Nebraska Press Association* to this as it would to all other prior restraints.

(ii) *Fourth and Tenth (and possibly Ninth) Circuits on "no comment" orders: the "reasonable likelihood" test.*

The Tenth Circuit and more recently the Fourth Circuit[19] have concluded no comment orders are justified where there is a reasonable likelihood of prejudice to a fair trial.[20]

(iii) *Sixth and Seventh Circuits on "no comment" orders: the "serious and imminent threat" test.*

The Sixth and Seventh Circuits have held no comment orders can only be imposed where a serious and imminent threat to a fair trial is shown.[21]

(iv) *Fifth Circuit on "closure" orders: the "bare possibility" test.*

The Fifth Circuit here adopted the least demanding standard of all by approving the trial judge's "bare

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[17]"The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trial.' A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and the judicial process to extensive public scrutiny and criticism." *Sheppard v. Maxwell, supra,* 384 U.S. at 350.

[18]*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974).

[19]*United States v. Tijerina, supra* note 7; *Central South Carolina Chapter, etc. v. Martin, supra* note 5.

[20]The Solicitor General believes the Ninth Circuit has also adopted this test. See note 7, *supra.*

[21]*Chicago Council of Lawyers v. Bauer, supra note 6, CBS, Inc. v. Young, supra,* note 6.

possibility" test. This "standard" might more correctly be designated "no standard", since the trial judge stated there was *no* reason to believe the jury was violating his cautionary instructions and *no* reason to believe the press would publish sensational or misleading information about the trial.

2. *State Courts.*

Most reported state court decisions adopt a strict test of *necessity* for entry of a restrictive order generally in accordance with this Court's decision in *Nebraska Press Association.* There are two recent exceptions, one of which is the subject of a pending appeal to this Court and the other of which, Petitioners are advised, will also be the subject of a request for review by this Court.

(i) *Florida.* Ironically, Florida's state trial judges, in contrast to its federal trial judges, must apply a stringent test in considering "closure" orders, and such orders are strongly disfavored.[22] In contrast, "no comment" orders may be entered merely for "good cause".[23]

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[22]*Miami Herald Publishing Company v. Collazo,* 389 So.2d 333 (Fla. 3d Dist. Ct. App. 1976), *cert. denied,* 342 So.2d 1100, (sealing a portion of court files) *News-Press Pub. Co., Inc. v. State,* 345 So.2d 865 (Fla. 2d Dist. Ct. App. 1977); *cert denied,* ___ So.2d ___, No. 51,639 (November 14, 1977) (sealing deposition transcript), *State ex rel. Gore Newspapers Company v. Tyson,* 313 So.2d 777 (Fla. 4th Dist. Ct. App. 1976) (closing trial),*overruled on oth. gnds., English v. McCrary,* 348 So.2d 293 (Fla. 1977).

[23]*State ex. rel. Miami Herald Publishing Company v. McIntosh.* 340 So.2d 904, 910 (Fla. 1977).

(ii) *New Jersey.* New Jersey applies the "serious and imminent threat" test to "closure" orders, *State v. Allen, supra,* 373 A.2d at 383, but apparently authorizes "no comment" orders where reasonable. *Ibid.*

(iii) *Minnesota.* The Minnesota Supreme Court has adopted a test similar to Florida and New Jersey with respect to a trial judge's sealing of documents relating to a criminal prosecution, which it deems a prior restraint, and further requires a written order showing exhaustion of alternatives. *Northwest Publications Inc. v. Anderson,* ___ Minn. ___, 259 N.W.2d 254 (1977).

(iv) *New Hampshire.* New Hampshire recently adopted a standard prohibiting closure of pretrial hearings unless there is a "substantial likelihood" of prejudice which *cannot* be avoided by alternative means. *Keene Publishing Corp. v. Keene District Court,* ___ N.H. ___, ___ A.2d ___ No. 7953 (November 23, 1977). See also *Thomson v. Cash,* 117 N.H. ___, 377 A.2d 135 (1977).

(v) *Ohio.* The Ohio Supreme Court has determined that pre-trial hearings may be closed only on a *finding* that "publicity will create a clear and present danger of serious and imminent threat to the administration of justice . . ." *State ex rel Dayton Newspapers, Inc. v. Phillips,* 351 N.E.2d 129, 135 (1976).

(vi) *Pennsylvania.* The Pennsylvania Supreme Court held pretrial suppression hearings may be closed to press and public at the request of the defendant with no further showing. *Philadelphia Newspapers, Inc., etc., et al. v. Jerome, supra* note 8. This Court recently

vacated the Pennsylvania Supreme Court's decision and remanded the case for clarification of the basis for its decision.

(vii) *New York.* The New York Court of Appeals recently ruled that closure of a preliminary hearing of two youths accused of murder was permissible because this matter involved "mere curiosity" rather than "legitimate public interest." The court indicated a different rule could apply to trials such as the one here involved: "In trials involving public officials for instance, the public may have an overwhelming interest in keeping all proceedings open" for there "the public's concern . . . [would be] focused on prosecutorial or judicial accountability." *Gannett Co., Inc. v. De Pasquale,* ___ N.Y. ___, ___ N.E.2d ___, No. 549 (December 19 1977). Other than to create a presumption in favor of closed pre-trial hearings involving "mere curiosity", New York does not adopt any standard for application of the presumption.

(c) *The decision below raises the significant question of whether closure orders permissible under the "bare possibility" standard so substantially limit as to imperil the common law public rights of public trial and public records.*

(i) *The common law public right of access to a public trial.*

The Fifth Circuit's decision raises a serious question as to the continued existence of the common law public right to a public trial. The tradition of open

judicial proceedings has existed for centuries[24] and in the American colonies antedates our Revolution by more than 100 years.[25] Thirty years ago this Court reaffirmed the common law rule, holding: "A trial is a public event. What transpires in the courtroom is public property." (*Craig v. Harney,* 331 U.S. 367, 374 (1947)). Shortly thereafter this Court traced in most compelling terms the ancient Anglo-American distrust for secret trials and the traditional requirements that "every criminal trial [be] subject to contemporaneous review in the forum of public opinion" so as to be "an effective restraint on possible abuse of judicial process." *In re Oliver,* 333 U.S. 257, 268, 270 (1948). The right of public trial being an "immemorial right"[26], under the Ninth Amendment it was "retained by the people".

A public trial insures the public's right to know how justice is administered, which is of particular importance in prosecutions and trials claimed to be "political" (*United States v. Dickinson,* 465 F.2d 496, 501 [5th Cir. 1972]).[27] This public right transcends the

[24]See Lord Coke, Second Institutes, 103-104; Wigmore, *Evidence,* (3d Ed. 1940) §2250.

[25]See generally, *United Press Association v. Valente,* 308 N.Y. 71, 89-94, 123 N.E.2d 777, 786-788 (1954) (Frossel, J., dissenting); Heller, *The Sixth Amendment to the Constitution of the United States.* (1917), p. 155.

[26]*Radin, The Right to a Public Trial,* 6 Temple L. Quarterly 381-383 (1932).

[27]In this case not only was a former U.S. Senator on trial for claimed political corruption, but the claims of "political trial" and doubts about the judicial system's ability to cope with such an unprecedented matter also placed the Department of Justice and the entire system of justice on trial in the eyes of the public.

personal right of the criminal defendant to close a trial (e.g., *Lewis v. Peyton*, 352 F.2d 791 [4th Cir. 1965]). In fact, any proposed limitations on "the constitutional requirement of a public trial must be tested by a standard of *strict and inescapable necessity*". *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 607 (3rd Cir. 1969) (emphasis supplied).

Despite the Fifth Circuit's contrary belief, the centuries-old common law right of full public entry to judicial proceedings is fundamental to this case. The Fifth Circuit here endorsed a trial judge's unfettered discretion to close to press and public all those portions of a trial not submitted to a jury, and the trial judge's actions as effectively closed those portions as if he had locked the courtroom doors. Decisions made in bench conferences are as likely as those rendered in open court to constitute abuse of discretion, and may never be judicially reviewable.[28] Allowing the public to view only what is presented to a jury vitiates the public's role as monitors of those decisions and the judicial system itself. The result, at minimum, is public suspicion of the judicial process; the very presumption of fairness and integrity enjoyed by the judiciary is the product of the tradition of open judicial proceedings.

[28]Thus if a ruling on the admissibility of a confession or other evidentiary ruling should frustrate a prosecution (and thereby the public represented by the prosecutor), and the jury therefore acquit, no judicial review is possible. If a "no-comment" instruction is given trial participants during a bench conference (as was the case here), the trial judge's actions will never see light of day. See also App. 63.

(ii) *The common law public right of access to public records.*

The decision of the Fifth Circuit also violates the common law principle that judicial records are public records by permitting their closure without establishing a standard for so doing. See *United States v. Mitchell, supra.* The Fifth Circuit specifically held that "exhibits produced under subpoena and not yet admitted into evidence, . . . [were] not yet in the public domain" (558 F.2d at 1210), and sanctioned the trial judge's standardless limitations on access to admitted exhibits. *Cf. United States v. Mitchell, supra.*

That exhibits offered but rejected, exhibits identified or authenticated in open court but not yet admitted into evidence, written communications between the judge and jury once made court exhibits, and all other exhibits remanded to the custody of a court clerk are public records seems incontestable.[29] Once these docu-

[29]See Local Rule 12, General Rules of the Middle District of Florida. As noted by the District of Columbia Circuit in *United States v. Mitchell, supra,* Rule 10(a), Federal Appellate Rules requires that exhibits be part of the record on appeal and the Manual for the Clerks of the United States District Courts prepared by the Judicial Conference of the United States pursuant to its authority under 28 U.S.C. §457 (1970), classifies exhibits as "auxiliary case records". 9 Moore's Federal Practice ¶21.04[2], pp. 1613, 1614, construes Federal Appellate Rule 10(a), to the effect that the trial record includes all exhibits *offered* in the proceeding and notes the need to show in the transcript where exhibits were "identified, offered, and received or rejected". See also Federal Appellate Rules 11(a) and 11(b). In fact, this being a criminal case involving a member of Congress, all these exhibits are "records of continuing value". *Manual for the Clerks of the United States District Court,* Exhibit 2, (Ref. 1301.4) at p. 2 (1954).

ments became public records the clerk was required to make such documents available to press and public.[30]

[30]Cf. General Rule 16(a), Rules of the Middle District of Florida, which prohibit disclosure only of "information that is not part of the public records of the Court".

II.

THE DECISION BELOW RAISES THE SIGNIFICANT, RECURRING AND UNRESOLVED PROBLEM OF WHETHER ENTRY OF A CLOSURE ORDER MAY BE CONSIDERED WITHOUT PRIOR COMPLIANCE WITH PROCEDURES MEETING DUE PROCESS REQUIREMENTS.

The Fifth Circuit affirmed the trial judge's orders entered without notice to Petitioners and other interested parties and without hearing, despite the Fifth Circuit's concession that Petitioners were the *targets* of these orders. As targets Petitioners' substantial interests could not be eliminated without prior notice and an opportunity to be heard. *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175 (1968). Furthermore, failure to put the restrictive orders in writing or docket them prevented the target from even learning of their existence or scope until the trial was nearly over.

Recent studies and cases as to the procedural minimums constitutionally required prior to considerations of entry of closure orders all mandate notice to press and public and affording an opportunity to be heard,[31] although the same result could be reached

[31]See, e.g., Recommended Court Procedures to Accommodate Rights of Fair Trial and Free Press, adopted by American Bar Association, August, 1976; Standard 5.1(a); Draft Report, American Bar Association Legal Advisory Committee on Fair Trial and Free Press (August, 1977); *Northwest Publications v. Anderson. supra.*

through this Court's exercise of its supervisory power over the lower federal courts.[32]

Even the trial judge haltingly acknowledged that prior notice and hearing might well have tempered the orders' scope and effect. Closure orders entered without these procedural protections necessitate hurried, and normally fruitless, attempts to secure appellate review. As the Fifth Circuit noted, Petitioners sought expedited review of the trial judge's actions, once discovered, through petitions for writs of mandamus and prohibition, 558 F.2d at 1206, n. 4. These petitions were denied *after the trial was over.*[33] Certainly this is no real remedy. Fundamental due process certainly requires more, for where First Amendment rights are involved, they may not be restrained without prior provision of "strict procedural safeguards, . . . including immediate appellate review." *National Socialist Party of America v. Skokie,* ___ U.S. ___, 53 L.Ed.2d 96 (1977).

[32]See *Schiavo v. United States,* 504 F.2d 1 (3rd Cir. 1974) *(en banc) cert. den. sub nom Ditter v. Philadelphia Newspapers, Inc.,* 419 U.S. 1096 (1975).

[33]Cf. *Nebraska Press Association v. Stuart,* 423 U.S. 1329, 1329 (1975) (Blackman, Circuit Justice) ("In this sense [restraint upon the reporting of news by the media], delay itself is a final decision.")

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

William C. Ballard
BAYNARD, LANG
AND BALLARD
669 First Avenue North
St. Petersburg, Florida
33701

Parker D. Thomson
Sanford L. Bohrer
PAUL & THOMSON
1300 Southeast First
National Bank Building
Miami, Florida 33131

James D. Spaniolo
One Herald Plaza
Miami, Florida 33101